80-1189

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. _____

CHARLES H. BUMPUS and
AMERICAN TAX EDUCATION SOCIETY et al.,
Petitioners

v.

UNITED STATES OF AMERICA and
JOHN E. HUNT, Special Agent,
Internal Revenue Service, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "*de novo* determination" prescribed by the Magistrates Act, 28 U.S.C. §636(b)(1) was intended to satisfy the requirement of Article III of the Constitution of the United States, such that failure to accord a *de novo* determination constitutes a denial of due process of law.

2. Whether failure of the Judge of the District Court to make a *de novo* determination of matters objected to is harmless error, when a party has filed timely objections to a Magistrate's Findings, Conclusions and Recommendations.

3. Whether an order of a District Judge, made upon a Magistrate's report, over timely objections, without consideration of the record of the trial, is void and not subject to review on the merits of the case at the appellate level.

PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT

Parties to the proceedings in the District Court not named in the caption herein are as follows: Belair Estates, Big Lake Heights, Irish Hills, Knollwood Heights, Minn-Arctic Development, Northern Lights Estates, Skyline Estates, Wasilla Development, Wasilla Estates, Woody Lake Estates, CB Enterprises, Continental Trust Association, World Wide Marketing & Tax Consultants, Able Co., Zurich Trust, Greenwich Trust, Universal Trust, Glenn A. Huff.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Charles H. Bumpus and American Tax Education Society respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 7, 1980.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. It appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Alaska.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 7, 1980. A timely petition for rehearing en banc was denied on October 15, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article III
United States Constitution Amendment V
28 U.S.C. §636(b)(1) The Magistrates Act

STATEMENT OF THE CASE

This case arises from proceedings to enforce Internal Revenue summonses. The appeal is based upon the fact that judges of the district court ordered that the summonses be enforced over petitioners' objections to Magistrate's findings, without making a *de novo* determination of matters objected to, as required by the Magistrates Act, 28 U.S.C. §636(b).

On June 14, 1979, Special Agent John Hunt served fifteen summonses on petitioner Charles H. Bumpus. The summonses called for production of records and testimony concerning Mr. Bumpus' personal finances, thirteen business entities and American Tax Education Society (the Society), a group organized to facilitate legal resistance to taxation through centralized tax research, business consultation and legal defense. Mr. Bumpus is an officer and active leader in the Society.

Bumpus appeared at the time and place specified and refused to comply with the summonses on the ground that the summonses were used in bad faith as part of an IRS plan to disrupt the functioning of the Society, and for no legitimate purpose since he was not undergoing an audit and IRS had never indicated any civil purpose in investigating him.

In September, 1979, IRS issued two summonses to Alaska National Bank of the North calling for production of bank records of twelve entities, including Bumpus, Glenn A. Huff, his business associate, and the Society. Huff is also an officer of the Society. Bumpus and Huff stayed compliance with these summonses in the manner prescribed by statute, 26 U.S.C. §7609.

The summoned parties were ordered to show cause why the summonses should not be enforced. The cases were consolidated for trial and heard by United States Magistrate John D. Roberts on November 30 and December 3, 1979. At the trial, counsel for Bumpus and Huff sought to introduce evidence in support of their arguments, and sought to impeach the testimony of Special Agent Hunt by questioning other government witnesses. The magistrate refused to admit the evidence and would not permit questioning of the other witnesses, who were present in the courtroom. Counsel made offers of proof with regard to the excluded evidence.

Proceedings were to have been recorded by the Court, but the tape recorder broke during the first day of the trial and was not repaired while the trial continued. A court stenographer made notes of the trial, but these were not transcribed and typed until February, 1980.

Magistrate Roberts filed Findings of Fact, Conclusions of Law and Recommendations to the District Court, and objections thereto were made and timely filed on January 2, 1980. On January 3, 1980, District Judge Fitzgerald ordered that the bank summonses be enforced, and on January 11, 1980, District Judge von der Heydt ordered Bumpus to comply with the fifteen summonses issued to him.

Petitioners sought stays pending appeal but these were denied by the district court and again at the appellate level. Following denial of a stay by the Supreme Court, Judge Fitzgerald again ordered that the bank records be produced.

The Society intervened and sought a protective order with regard to its records, based on First Amendment grounds. Judge Fitzgerald ordered that the Society's bank records be examined by him in camera to eliminate member names before being given to the government. Bank of the North turned over the other bank records pursuant to the order of the court.

Bumpus appeared in response to the district court's order of enforcement, but refused to comply with the order on the ground that it was void because it was issued without due process of law. Judge von der Heydt secured a copy of the trial transcript after it was filed. After reviewing it, he ordered Bumpus to appear on May 25, 1980, and show why he should not be held in contempt for refusing to obey his order of January 11. Bumpus made his due process objection, but Judge von der Heydt held him in contempt and ordered that he be jailed until he complied.

The Court of Appeals for the Ninth Circuit stayed the contempt order and Bumpus was released. The appeal was expedited. The parties argued the case on July 9, 1980, and a memorandum opinion was filed August 7, 1980.

The Ninth Circuit opinion acknowledged that the judges of the district court should have made a *de novo* determination as required by statute but held that the error was harmless. The court ruled that the appeal was moot as to the bank records

which had been produced. A petition for rehearing before the court *en banc* was timely filed. Rehearing was denied by an order filed October 15, 1980.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT WHICH INDICATE A CONSTITUTIONAL BASIS FOR THE *DE NOVO* DETERMINATION PROVISION OF THE MAGISTRATES ACT AND STATE THAT JUDICIAL ERROR WHICH DENIES DUE PROCESS OF LAW MAY NOT BE IGNORED.

Petitioners' arguments herein may be simply stated. They assert that they were entitled to a *de novo* determination by the judges of the district court upon the questions raised in their objections to the magistrates findings and conclusions, and that failure of the judges to render a *de novo* determination constitutes a denial of due process of law which is not and cannot be harmless error.

Their analysis proceeds from the assertion, which can hardly be questioned at this late date, that the petitioners had a property interest in the records sought through the summonses. Each of the summonses called for the records of the petitioners' own business affairs, and in the case of the fifteen summonses issued to Bumpus, the subject matter was sought directly from him. Thus petitioners had a property interest at stake which was entitled to due process protection. *Donaldson v. United States*, 400 U.S. 517 (1971); *Reisman v. Caplin*, 375 U.S. 440 (1964).

As this Court has recently restated in *United States v. Raddatz*, ____U.S.____, 48 U.S.L.W. 4813, 4816 (June 23, 1980), "[t]he guarantees of due process call for a 'hearing appropriate to the nature of the case'. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)."

Congress has defined the parameters of an appropriate hearing in cases tried by United States Magistrates in the Magistrates Act, 28 U.S.C. §636. The legislative history of the act is replete with indications of congressional opinion that care must be taken in delegating authority to magistrates to assure

that "the ultimate adjudicatory determination was reserved to the district court judge". *Raddatz*, 48 U.S.L.W. at 4816. This assurance was necessary in order to satisfy the requirement of Art. III of the Constitution, to the effect that all cases must be decided by tenured judges.

The "decision" of the district judge would be a rubber stamp formality if the judge did no more than ratify the recommendation of the magistrate in every case. Therefore Congress provided for mandatory review and independent determination by an Art. III judge whenever any party objects appropriately to the magistrate's report. This is the "*de novo* determination" provision set forth in 28 U.S.C. §636(b)(1).

This court decided in *Raddatz, supra*, that a judge need not rehear the evidence personally in order to make a *de novo* determination, but that he may do so by making a fresh assessment from the record developed before the magistrate. The decision was consistent with Court's previous ruling that in magistrate-tried cases, parties are nonetheless constitutionally entitled to "an independent determination, on the record, by the district judge. . . ." *Mathews v. Weber*, 423 U.S. 261, 263 (1976). The *Raddatz* Court concluded that, with its mandatory review provision, "the statute strikes the proper balance between the demands of due process and the constraints of Art. III.". *Raddatz*, 48 U.S.L.W. at 4818.

It has never been argued that petitioners herein did not make objection to the magistrate's report, appropriately and in a timely manner. Nor has it been argued that the district judges complied with the *de novo* determination provision. It could hardly be so argued since there was no trial record in existence at the time the judges ordered that the summonses be enforced. Rather , it is clear that the *de novo* determination provision was entirely ignored.

The Ninth Circuit opinion cited *Raddatz* and acknowledged that the district court "must make a *de novo* determination of those portions of the magistrate's proceedings to which specific objection is made, prior to enforcing the summonses." See page *xxx* of Appendix hereto. Nevertheless, the opinion concluded "that in the unique procedural circumstances of these cases, it would be an idle act now to reverse the district court's orders."

This ruling is in direct conflict with the Ninth Circuit opinion in *Orand v. United States*, 602 F.2d 207 (9th Cir. 1979). In *Orand*, as here, there was no tape recording and no prepared transcript at the time the district judge rendered the decision, but in *Orand*, the court reversed and remanded "to allow the district court the opportunity to make a *de novo* determination of the facts and legal conclusions."

Apparently the Ninth Circuit reasoned that under the standards for enforcement set forth in *United States v. LaSalle National Bank*, 437 U.S. 298 (1977), successful defense against summons enforcement is foreclosed. Although *LaSalle* certainly made summons defense more difficult, the Court assuredly did not say that defense was impossible.

Petitioners raised numerous defenses to enforcement. They alleged that there was no civil purpose for the tax investigation or for the summonses themselves, they challenged the credibility of the government witness and they alleged lack of relevance and overbreadth with respect to some of the summonses. They asserted the First Amendment rights of the Society, rights which were later recognized and protected with respect to the bank summons by District Judge Fitzgerald.

The magistrate's report ignored most of petitioners' arguments, and cited no authority for some key assertions therein. Petitioners never had the opportunity to appeal on the merits of the case, the exclusion of evidence and the denial of witness testimony. Since the trial record itself was not before the district court at the time the orders were filed, that trial record formed no part of the district court orders and was not brought up on appeal. *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970); *Dictograph Products Co. v. Sonotone Corp.*, 231 F.2d 867 (2d Cir. 1956). Still, the Ninth Circuit based its opinion on the merits of the case. This in itself is error and a denial of due process.

But even if petitioners' arguments had little chance of success, this Court has stated on several occasions that

> the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due

process be observed, see *Boddie v. Connecticut*, 401 U.S. 371, 375, 91 S.Ct. 780, 784, 28 L.Ed.2d 113 (1971); *Anti-Fascist Committee v. McGrath*, 341 U.S., at 171-172, 71 S.Ct., at 648-649 (Frankfurter, J., concurring).

. . .

Carey v. Piphus, 435 U.S. 247, 266 (1978). See also *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972); *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915):

> To one who protests the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

Coe at 424. These words leave little room for argument against petitioners' position.

Petitioners herein were denied a fair trial by the actions of the District Court. That much is certain. The Ninth Circuit opinion acknowledged it, yet failed to provide any appropriate relief. Justice Stevens, dissenting in *Codd v. Velger*, 429 U.S. 624 (1977), thus spoke prophetically when he said:

> Today's holding may have the unfortunate effect of encouraging public officials to deny hearings when they feel confident of the correctness of their decision.

Codd v. Velger at 636. As he went on to say:

> if state action has consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty, it is essential that fair procedures be followed for reasons that have nothing to do with the merits of the individual case.

Codd v. Velger at 636. As hearings and entire trials are increasingly referred to magistrates, it is increasingly important to assure that this change does not signal the demise of procedural due process in the federal courts.

The constitutional validity of the Magistrates Act is called into question by the Ninth Circuit opinion. If denial of the *de novo* determination prescribed in §636(b)(1) can be "harmless error," then magistrates can, in effect, decide cases without an "independent determination" by an Article III judge, a result which this Court has consistently indicated would be unconstitutional. *Mathews v. Weber, supra*; *Raddatz, supra.*

The orders of the district court were issued without due process of law and are void. *United States v. Walker*, 109 U.S. 258 (1883); *Marshall v. Board of Education, Bergenfield, New Jersey*, 575 F.2d 417 (3rd Cir. 1978); In re Four Seasons Securities Law Litigation, 502 F.2d 834 (10th Cir. 1974); *Winhoven v. United States*, 201 F.2d 174 (9th Cir. 1952). Denial of due process is not harmless error, as numerous decisions of this Court have indicated. The opinion of the Ninth Circuit is in direct conflict with these decisions.

This conflict justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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UNITED STATES CONSTITUTION
ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of

Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 636(b)(1)

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA and JOHN E. HUNT, Special Agent of the Internal Revenue Service,
Petitioners
vs.
ALASKA NATIONAL BANK OF THE NORTH and RONALD G. ROBERTSON, assistant Vice President,
Respondent(s)
vs.
GLENN A. HUFF, Intervener-Applicant.

No. A79-310 Civil

UNITED STATES OF AMERICA and JOHN E. HUNT, Special Agent of the Internal Revenue Service,
Petitioners,
vs.
ALASKA NATIONAL BANK OF THE NORTH and RONALD G. ROBERTSON, Assistant Vice President,
Respondent(s),
vs.
CHARLES H. BUMPUS, Intervener-Applicant

No. A79-311 Civil

UNITED STATES OF AMERICA and JOHN E. HUNT, Special Agent of the Internal Revenue Service,
Petitioners,
vs.
BELAIR ESTATES, a partnership; BIG LAKE HEIGHTS, a partnership; IRISH HILLS, a partnership; KNOLLWOOD

No. A78-348 CIV
(Consolidated)

HEIGHTS, a partnership; MINN-ARCTIC DEVELOPMENT, a partnership; NORTHERN LIGHTS ESTATES, a partnership; SKYLINE ESTATES, a partnership; WASILLA DEVELOPMENT, a partnership; WASILLA ESTATES, a partnership; WOODY LAKE ESTATES, a partnership; AMERICAN TAX EDUCATION SOCIETY; CB ENTERPRISES; CONTINENTAL TRUST ASSOCIATION; MADCO, d/b/a MINN-ARCTIC; and WORLD WIDE MARKETING & TAX CONSULTANTS, Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS TO THE DISTRICT COURT

This matter comes before the Court for consideration of the petitions to enforce Internal Revenue summons filed in causes number A79-310 Civil, A79-311 Civil and A79-348 Civil. Pursuant to a Stipulation for Consolidation of the above styled summons enforcement proceedings, an evidentiary hearing was held and oral argument was heard before the U.S. Magistrate based upon an order of referral by the United States District Judge.

The petitioners were represented by Stephen Fuerth, Attorney with the Tax Division, Department of Justice. Respondents Charles H. Bumpus, et al. and intervenor/applicants appeared through their attorneys Eric Jensen, Esq. and Jean Schanen, Esq. Ronald G. Robertson, Assistant Vice President, Alaska Bank of the North, Respondent in A79-310 Civil and A79-311 Civil appeared at the hearing and was excused during the proceedings. The Bank took no position on enforcement. At the hearing the petitioner and respondents-intervenors Charles H. Bumpus and Glenn A. Huff offered evidence.

In each of these actions Petitioners, United States of America and John E. Hunt, Special Agent of the Internal

Revenue Service, filed a petition to enforce an Internal Revenue Service summons requesting this Court: to issue an order in A79-310 Civil directing Respondents Robert G. Robertson and Alaska National Bank of the North to give testimony relating to the tax liabilities of Glenn A Huff for the taxable years 1976, 1977, and 1978, and to produce for examination certain specified records, books and other documents as more particularly described in the summonses attached to the petition; in A79-311 Civil to issue an order directing Respondents Robert G. Robertson and Alaska National Bank of the North to give testimony relating to the tax liabilities of Charles H. Bumpus for the taxable years 1976, 1977, and 1978, and to produce for examination books, papers, records or other data described in the summonses; and in A79-348 Civil to issue an order directing the Respondents Charles H. Bumpus, Belair Estates, a partnership, Big Lake Heights, a partnership, Irish Hills, a partnership, Knollwood Heights, a partnership, Minn-Arctic Development, a partnership, Northern Lights Estates, a partnership, Skyline Estates, a partnership, Wasilla Development, a partnership, Wasilla Estates, a partnership, Woody Lake Estates, a partnership, American Tax Education Society, CB Enterprises, Continental Trust Association, Minn-Arctic d/b/a MADCO and World Wide Marketing & Tax Consultants to appear before the said John E. Hunt to give testimony relating to the tax liabilities of Charles H. Bumpus for the taxable years 1976, 1977, and 1978, and to produce for examination books, records and other papers, all of which are described in the summonses attached to the petition.

On October 30, 1979 this Court issued orders directing Respondents Alaska National Bank of the North and Ronald G. Robertson, Assistant Vice President to appear and show cause why the summons in A79-310 Civil and A79-311 Civil should not be enforced. A similar order to show cause was entered as to the respondents in A79-348 Civil on November 2, 1979.

Under 26 U.S.C. 7609 parties whose records have been sought have a statutory right to intervene. The intervenors sought to appear in A79-310 Civil through counsel for Glenn A. Huff; Huff claimed to be a "partner", "trustee" or "fiduciary" of each of the named entities.

In A79-310 Civil the Motions to Intervene as Respondents

by Greenwich Trust, a business trust organization, Able Company, a business trust organization, Universal Trust Association, a business trust organization, and Zurich Trust, a business trust organization, were denied for the reason that there was an insufficient showing that any individual present or counsel for Glenn A. Huff had authority to represent or act on behalf of those entities. The Motion to Intervene in A79-310 Civil by Glenn A. Huff was granted.

In A79-311 Civil Motions to Intervene as respondents, filed on behalf of Continental Trust Association, a business trust organization, World Wide Marketing and Tax Consultants, a business trust organization, MADCO, a business trust organization, d/b/a Minn-Arctic Development Company, an Alaskan partnership, American Tax Education Society, an unincorporated association of members, and CB Enterprises, a business trust organization, were withdrawn. The Motion to Intervene by Charles H. Bumpus, an individual, was granted. In A79-348 Civil Respondents CB Enterprises, Continental Trust Association, MADCO, d/b/a Minn-Arctic Development and World Wide Marketing and Tax Consultants moved to quash the return of service of summons directed to them on the grounds that Charles H. Bumpus was served with process in his individual capacity and not as a representative of the entity. The Motions to Quash Return of Service were denied and the Court directed that the summonses be deemed legally sufficient to bring those entities before the Court which are legally recognizable entities. The summonses clearly describe who and what was being summoned and properly apprised them of records to be brought. *Brody v. United States*, 243 F. 2d 378 (1st Cir. 1957), cert. den. 77 S. Ct. 1384 (1957); *Falsone v. United States*, 205 F. 2d 734 (5th Cir. 1953); *United States v. American Standard Remodeling Corp.*, 252 F. Supp. 690, 692 (W.D. Pa. 1966).

A Motion for Reassignment of the Consolidated Cause to a Judge of the District Court was ruled upon as follows: the evidentiary hearing on the Orders to show Cause were ordered to proceed before the U.S. Magistrate, and the U.S. Magistrate would then make a Report and Recommendation to the United States District Judge who would make the ultimate

determination on all issues before the Court.

Respondent and Intervenor/Applicant Charles H. Bumpus and Glenn A. Huff submitted a Motion to Allow Additional Time for Discovery in the consolidated cases. The motion sought to depose certain special agents and revenue agents of the IRS, as well as the Commissioner of Internal Revenue Service.

The U.S. Magistrate having considered all of the pleadings, memoranda, exhibits, evidence received and arguments of counsel, pursuant to Local Rule 30, now makes the following findings of fact and conclusions of Law:

FINDINGS OF FACT

1. Petitioner, John E. Hunt, is a Special Agent of the Internal Revenue Service, employed in the Criminal Investigation Division of the Office of the District Director of Internal Revenue in Anchorage, Alaska, and is authorized to issue Internal Revenue summonses pursuant to the Internal Revenue Code, 26 U.S.C. 7602.

2. On September 4, 1979 Agent Hunt issued IRS summonses (Treasury Form 2039), as part of his investigation to determine the civil tax liability of Glenn A. Huff (A79-310 Civil) and Charles H. Bumpus (A79-311 Civil), Respondents in this consolidated proceeding. On June 14, 1979 Agent Hunt issued IRS summonses to Charles H. Bumpus and named Respondents to determine the civil tax liability of Respondent Charles H. Bumpus (A79-348 Civil).

3. On September 4, 1979, copies of the summonses in A79-310 Civil and A79-311 Civil were personally served on Ronald G. Robertson, Assistant Vice President, Alaska National Bank of the North. On June 14, 1979 copies of the summonses in A79-348 Civil were personally served on Respondent Charles H. Bumpus in A79-348 Civil by Agent Hunt.

4. The summonses were properly and lawfully served by Agent Hunt pursuant to the Internal Revenue Code, 26 U.S.C. 7603 and 7609, and the summonses had been lawfully issued under the Internal Revenue Code, 26 U.S.C. 7602.

5. The summonses called for records of the Alaska National Bank of the North (A79-310 Civil and A79-311 Civil), including the signature cards, time certificate of deposits, cashier checks and applications, loan records, escrow and collection of account records, safe deposit box records, Forms 1099, and

letters of credit and related documents; and records of Charles H. Bumpus on behalf of named entities (A79-348 Civil), including partnership agreements, general ledgers and subsidiary ledgers, journals, profit and loss statements, balance sheet statements, real estate contracts, deeds of trust, warranty deeds, bank statements and cancelled checks, saving passbooks, notes receivable, contract collection escrows, Forms 1065 (U.S. Partnership Return of Income and Related Schedules) and trust declarations for certain entities.

6. The purpose of the summonses in the three actions which called for testimony and examination of books, records and other data was and continues to be to secure information relevant to the IRS inquiry into the civil tax liability of Glenn A. Huff or Charles H. Bumpus for the taxable years 1976-1978. As such, the issuance of said summonses was in furtherance of a legitimate purpose under the Internal Revenue Code, 26 U.S.C. 7602.

7. Special Agent Hunt has an articulable need for the records of the various named entities to determine the tax liability of Glenn A. Huff and Charles H. Bumpus; the records of these entities may show income or an interest which is taxable to the respective taxpayer personally. Testimony at the hearing reveals that respondents Huff and Bumpus either have an interest in the aforesaid entities or that one or more entities may be successors to other named entities.

8. To date the investigation into the civil tax liabilities of respondents/intervenors has not been completed, and no determination has been made by the Internal Revenue Service as to whether or not either of the taxpayers Glenn A. Huff or Charles H. Bumpus has correctly reported his income tax liabilities for the years 1976, 1977, and 1978. Nor has any determination been made by the IRS as to whether or not these taxpayers have violated any criminal statutes.

9. To date no recommendation has been made by Petitioner, Agent Hunt, to the Chief of Intelligence to prosecute either of the taxpayers Glenn A. Huff or Charles H. Bumpus, nor has a formal recommendation to prosecute been submitted by the Internal Revenue Service to the Justice Department.

10. No recommendation has been made to assess any additional income tax deficiencies against the taxpayer Glenn A.

Huff or the taxpayer Charles H. Bumpus for the years 1976, 1977 and 1978.

11. On September 6, 1979 Agent Hunt served notices by certified mail pursuant to Section 7609(a) of Title 26, U.S.C. as to cause A79-310 Civil on Glenn A. Huff; Universal Trust, Greenwich Trust, Zurich Trust, and Able Company.

12. On that same date he served Section 7609(a) notices by certified mail as to cause A79-311 Civil on Charles H. Bumpus; American Tax Education Society; World Wide Marketing and Tax Consultants; CB Enterprises; Continental Trust Association; Minn-Arctic Development Co., a trust or business organization; and Minn-Arctic Development Co., a partnership.

13. Respondent Ronald G. Robertson failed to appear to give testimony and produce documents on September 25, 1979 for the reason notice not to appear had been given to Robertson pursuant to Section 7609(b)(2) of Title 26, U.S.C. Respondent Robertson has failed to comply with the summonses in A79-310 and A79-311 Civil thereafter.

14. On June 25, the Respondents Charles H. Bumpus, Belair Estates, Big Lake Heights, Irish Hills, Knollwood Heights, Minn-Arctic Development, Northern Lights Estates, Skyline Estates, Wasilla Development, Wasilla Estates, Woody Lake Estates, American Tax Education Society, CB Enterprises, Continental Trust Association, Minn-Arctic, d/b/a MADCO, and World Wide Marketing and Tax Consultants, appeared in response to the summonses but refused to produce any of the records summoned and refused to testify. Said respondents' refusal to comply with the summonses has continued thereafter.

15. The books, records and other data sought by the summonses in any of the aforesaid civil actions are not in petitioners possession, nor have they been previously examined by petitioners.

16. In his investigation of the tax liabilities of Glenn A. Huff and Charles H. Bumpus, Agent Hunt has seen only two records from the Alaska Bank of the North, namely signatures cards for World Wide Marketing and Tax Consultants and one check of Zurich Trust received from a previous summons enforcement.

17. The investigation as to the tax liabilities of Glenn A. Huff for 1976 through 1978 was commenced in May 1979 as a

result of a referral by the Examination Division of IRS. Agent Hunt commenced his investigation as to the tax liabilities of Charles H. Bumpus for 1976 through 1978 in the summer or fall of 1978 as a result of his case development assignments. Agent Hunt first contacted Glenn Huff in May or June 1979 at the office of Charles H. Bumpus in Wasilla, Alaska.

18. In the issuance and service of the summonses all of the administrative steps and procedures required by the Internal Revenue Code, 26 U.S.C. 7609, relating to third-party summonses herein were followed.

19. The Internal Revenue Service has not abandoned its inquiry into the civil tax liability of Glenn A. Huff or Charles H. Bumpus.

20. No factual basis exists for any finding of harassment, bad faith, conflict of interest, or violation of any laws relating to the issuance, service, or judicial enforcement of these summonses by the U.S. District Court.

21. All records of the fourteen (14) entities from which documents were summoned in cause A79-348 Civil are relevant to the scope of Agent Hunt's investigation of the tax liabilities of Charles H. Bumpus.

22. Agent Hunt did not issue the summonses for the purpose of obtaining a membership list of the American Tax Education Society.

23. There is no evidence that Agent Hunt or any other IRS investigator has requested the State of Alaska to issue a Subpoena Duces Tecum for the production of documents to Glenn A. Huff or Charles H. Bumpus.

24. Respondents, Alaska National Bank of the North, Ronald G. Robertson, Assistant Vice President, and Charles H. Bumpus, individually and in his representative capacity, are in possession and control of testimony and documents which may be relevant to this investigation.[1]

CONCLUSIONS OF LAW

1. The Court has jurisdiction to enforce the Internal Revenue Service's summonses in accordance with Sections 7402(b) and 7604(a) of Title 26, U.S.C.

2. The petitioners have made legally sufficient showings that they have met the standards to obtain judicial enforcement of the summonses. *United States v. Church of Scientology of*

California, 520 F. 2d 818 (9th Cir. 1975). To meet this burden the IRS has shown that the investigation has a legitimate purpose and that the material sought may be relevant to that investigation, that the information sought is not already in the Government's possession, and that the government has followed the procedural steps required by the Internal Revenue Code. Compare *United States v. Genser*, 582 F. 2d 292, 302 (3d Cir. 1978) (Genser I). The IRS met the burden established in *United States v. LaSalle National Bank*, 434 U.S. 996 (1978).

3. After this initial showing was made by the petitioners, the burden then shifted to the taxpayer-intervenors to establish that the summonses were issued in bad faith or for an improper purpose. *United States v. LaSalle National Bank, supra; United States v. Powell*, 379 U.S. 48 (1964); *United States v. Zack*, 521 F. 2d 1366 (9th Cir. 1975). The taxpayer-intervenors failed to meet this burden.

4. There is no legal merit to the intervenors other arguments. That a single special agent intends only to gather information for a criminal investigation is not dispositive of the good faith of the IRS as an institution, *United States v. LaSalle National Bank, supra*. To resist enforcement of the summonses, the taxpayer-intervenors must disprove the actual existence of a valid civil tax determination or collection purpose by IRS. *United States v. LaSalle National Bank, supra* at 437. The use of summonses in investigating potentially criminal conduct has been authorized by Congress. *United States v. LaSalle National Bank, supra* at 307.

5. A special agent is authorized pursuant to 26 U.S.C. 7602 to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences. *Couch v. United States*, 409 U.S. 322, 326 (1973).

6. Respondents herein challenging the enforcement of the summonses have not met their burden to show an abuse of process. *United States v. Powell*, 379 U.S. 48 (1964); *United States v. Fisher*, 500 F. 2d 683 (3d Cir. 1974). It is not a prerequisite to summons enforcement herein that the IRS conduct a joint investigation as to the tax liabilities of individual respondents **and** their spouses. The fact that an investigation with the potential for a recommendation of criminal prosecution is being conducted is not sufficient to establish bad faith. *United*

States v. Cecil E. Lucas General Con. Inc., 406 F. Supp. 1267, 1273 (D. S.C. 1975). The IRS investigation of the tax liability of Glenn A. Huff and Charles H. Bumpus for 1976-78 has not reached the point where its objective is "solely criminal". The Court concludes as a matter of law that the summonses were issued in good faith. Allegations supporting a "bad faith" defense are insufficient if conclusionary. *United States v. Garden State National Bank*, NDS. 79-1423 through 79-1428, 79-1681 and 79-1682 (3rd Cir., filed October 10, 1979 at p. 20).

7. In order for a summons to be deemed valid the records requested must be in the possession or under the control of the person summoned. *United States v. Howard*, 360 F. 2d 373 (3d Cir. 1966). Respondents have not shown that Glenn A. Huff or Charles H. Bumpus were not in control or possession of the documents sought by the summonses.

8. The test as to whether the records sought by the Internal Revenue Service summonses are relevant to the determination of tax liability is whether the inspection sought might throw light upon the correctness of the taxpayers' 1976-78 tax liability. *United States v. Ryan*, 455 F. 2d 728, 733 (9th Cir. 1972); *United States v. Shlom*, 420 F. 2d 263, 265 (2d Cir. 1969), cert. denied 397 U.S. 1074 (1970).

It is permissible for IRS to investigate matters relating to a partnership where that tax investigation is undertaken in good faith to further the investigation of the civil tax liabilities of a member of the partnership. An examination of records produced at the evidentiary hearing herein reveals that such an investigation would be appropriate. The IRS may investigate matters relating to a trust where there is reasonable cause to believe there may be taxable consequences to a trusteee particularly where the trust is alleged to be shown or fraudulent. Respondents' records and testimony sought are relevant to the 1976-78 tax liability of the taxpayers Glenn A. Huff and Charles H. Bumpus. Compare *United States v. Ruggeiro*, 425 F. 2d 1069, 1071 (9th Cir. 1970), cert. denied 401 U.S. 922 (1971).

9. The Court concludes that it can fairly decide the case on the record before it and that no further proceedings, including discovery, should be directed. Compare *United States v. Genser*, 595 F. 2d 146, 152 (3d Cir. 1979) (Genser II); *United States v. Genser, supra* (Genser I) at 302; *United States v.*

McCarthy, 514 F. 2d 368, 372-73 (3rd Cir. 1975); *United States v. Wright Motor Co.*, 536 F. 2d 1090 (5th Cir. 1976); *United States v. Zack, supra*, *United States v. Church of Scientology, supra*; *United States v. Turner*, 408 F. 2d 272 (7th Cir. 1973); *United States v. Salter*, 432 F. 2d 697 (1st Cir. 1970).

10. The summonses are not overly broad or unreasonably burdensome. Summonses issued by an investigating agent before that agent has recommended prosecution are considered virtually unassailable. Compare *United States v. Genser, supra* (Genser II) at 151 (3d Cir. 1979); *United States v. Schutterle*, 586 F. 2d 1201 (8th Cir. 1978); *United States v. Garden State National Bank, supra.*

11. At the evidentiary hearing on November 30, 1979 respondent/taxpayers were allowed to discover the duties of the investigating agents, the dates the investigations began, the specific areas of the taxpayers return under investigation, what issues were presently involved in Agent Hunt's investigation of the taxpayers, how the documents sought in the summonses related to the particular issues under investigation by Agent Hunt, and any statements made by either taxpayer which might indicate criminal violations. These areas of inquiry were sufficient for the Court to decide the issues before it. Compare *United States v. Wright Motor Co.*, 536 F. 2d 1090 (5th Cir. 1976), rehearing and rehearing in blank denied; *United States v. LaSalle National Bank, supra* at 316; *Genser II, supra* at 152.

DATED this 17th of December, 1979, at Anchorage, Alaska.

John D. Roberts
United States Magistrate

Filed: December 18, 1979

IN THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners,

v. No. A79-310 Civil

ALASKA NATIONAL BANK OF
THE NORTH et al,

Respondents,

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special
Agent, of the Internal Revenue
Service,

Petitioners,

v. No. A79-311 Civil

ALASKA NATIONAL BANK OF
THE NORTH, et al,

Respondents,

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners,

v. No. A79-348 Civil

CHARLES H. BUMPUS, et al,
Respondents,

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS TO THE DISTRICT COURT

Comes now CHARLES H. BUMPUS and GLENN A. HUFF, respondents and intervenors in the above entitled cause, by and through their attorneys Eric Jensen and Jean Schanen, and for their objections to United States Magistrate John D.Roberts' Findings of Fact, Conclusions of Law, and Recommendations to the District Court, state as follows:

FINDINGS OF FACT

Respondent - Intervenors object to Finding Number 2 wherein it is stated that Special Agent John E. Hunt issued I.R.S. summonses as part of his investigation to determine the civil tax liability of Glenn A. Huff and Charles H. Bumpus for the reasons that, as the record shows,

(a) each and every summons issued by Agent Hunt made no reference to any civil tax liability,

(b) Hunt's function as a Special Agent is, necessarily and by his own testimony, to conduct a criminal investigation, not an investigation to determine civil tax liability,

(c) both Bumpus and Huff, having filed joint income tax returns with their wives for all the tax years in question, have no possible **civil** tax liability as individuals, but only possible civil tax liability jointly with their wives, whereas all the I.R.S. summonses addressed Bumpus' and Huff's individual tax liability, and hence could only have addressed their possible criminal tax liability,

(d) evidence erroneously excluded by the Court would have shown that it is the practice and procedure of the I.R.S., when issuing summonses for the production of records and testimony in regard to the civil tax liability of joint filing taxpayers to address said summonses to the joint tax liability of both husband and wife.

As shown by Internal Revenue Manual, Section 5894.2, incorporated herein and attached as Exhibit A, the Internal Revenue Service recognizes that the identification with full particularity of the taxpayer whose liability is questioned through an I.R.S. summons is a matter of significance and importance. Agent Hunt had full opportunity in testifying to explain any

errors in the manner in which the summonses were addressed but did not do so. It can only be concluded that the summonses were intended to be addressed as they were addressed, to the possible individual, and hence criminal tax liability of Bumpus and Huff.

Respondent - Intervenors object to Finding Number 4, wherein it is stated that the summonses which are the subject of this action had been lawfully issued, for the reason that the record and the documents submitted with the case show, and further evidence erroneously excluded by the Court would have shown that said summons were not lawfully issued, but rather were issued

(a) in bad faith, for the purpose of harrassing Bumpus and Huff in the conduct of their activities in connection with the American Tax Education Society, as part of a comprehensive purpose by the I.R.S. to stop American Tax Education Society and other organizations from functioning.

(b) in bad faith, for the illegal purpose of obtaining the membership list of the American Tax Education Society.

(c) in bad faith, and in violation of the Privacy Act, Title 5, U.S.C. Section 552a (e) (2), in that no agent of the I.R.S. ever attempted to obtain the information sought by the summonses through a direct request of Bumpus or Huff.

(d) for no legitimate purpose, in that I.R.S. had no civil purpose in issuing these summonses or in conducting the underlying investigation of which they are a part.

The evidence put forth by the government to show the alleged civil purpose of the I.R.S. in issuing the summonses which are the subject of this action consists of no more than the uncorroborated testimony of Special Agent John E. Hunt. Agent Hunt testified that Revenue Agent Bruce Kinney is conducting an investigation of the civil tax liability of Bumpus and Huff, but even though Agent Kinney was in the courtroom throughout the proceedings, the Court refused to allow him to take the stand to testify upon his own oath that he is doing so. The government offered no documentary evidence of any civil purpose, and petitioners counsel tacitly admitted on the record that none exists.

Against the government's mere allegation of civil purpose,

evidence was adduced to the contrary that

(a) I.R.S. never notified either Bumpus or Huff of an audit in any way.

(b) both Bumpus and Huff questioned Special Agent Hunt about the absence of a civil purpose in the I.R.S. investigation of them and he did not indicate to them that there was any civil purpose or anything but a purpose to further a criminal investigation by the I.R.S.

(c) Special Agent Hunt received and accepted documents giving power of attorney to Jean S. Schanen to represent Bumpus and Huff with regard to income tax matters for the tax years covered by the summonses herein, said documents having been signed only by Bumpus and Huff as individuals and not by their wives. Agent Hunt examined those documents and demanded that they be corrected as to the specific tax years in question, but made no objection on the ground that they were not signed by respondent - intervenors' wives.

Testimony of Revenue Agents Kinney and Clifford Kohler erroneously excluded by the Court would have shown that I.R.S. practice and procedure to require signatures of both husband and wife on a Power of Attorney in matters of representation in regard to their joint civil tax liability, and to refuse to accept a power of attorney not signed by both parties. This requirement is of greatest importance since representation in matters of civil tax liability affects the property interests of both parties and both have the right to full Constitutional protection of those interests before any adverse determination can be made.

In accepting Bumpus' and Huff's Power of Attorney forms, after reviewing them and with full knowledge of the facts involved, the I.R.S. acknowledged through its agent John Hunt that there are no questions of civil tax liability, requiring or permitting advice or representation of counsel, before the Service. This obviously excludes any possible civil purpose in issuing the summonses at issue herein, or in conducting the underlying investigation of Bumpus and Huff. Indeed, as noted above, the summonses themselves fail to indicate any civil purpose, and respondent - intervenors contend that the record, fairly read, indicates that none exists.

Respondent - intervenors object to Finding Number 6 for

reasons just stated.

Respondent - intervenors object to Finding Number 7 in that they have disclaimed by affidavit receipt of income from any of the named entities, and that, specifically, Glenn A. Huff has no connection whatsoever with Greenwich Trust, and in that no evidence to the contrary has been adduced by petitioners.

Respondent-intervenors object to Finding Number 8 to the extent that it indicates that I.R.S. is conducting an investigation into the civil tax liability of Bumpus and Huff.

Respondent - intervenors object to findings numbered 11 and 12, wherein it is stated that Agent Hunt served notice as to causes A79-310 and A79-311 on Universal Trust, Greenwich Trust, Zurich Trust, Continental Trust and World Wide Marketing and Tax Consultants by certified mail, in that said notices were not sent to the last address known to I.R.S. Said notices were duly returned as misaddressed, and Agent Hunt failed to re-send notices to the correct addresses.

Respondent - intervenors object to Finding Number 15 in that all of the tax returns sought in the I.R.S. summonses have been properly filed and are now in the possession of the I.R.S., and in that with respect of the documents mentioned in Finding Number 16, said documents have already been examined by petitioners.

Respondent - intervenors object to Finding Number 17, and assert that, were they allowed to obtain additional discovery as sought by their motion they would be able to prove otherwise.

Respondent - intervenors object to Finding Number 18, in that, as appears above, notice of this action was not given to Universal Trust, Greenwich Trust, Zurich Trust, Continental Trust, or World Wide Marketing and Tax Consultants.

Respondent - intervenors object to Finding Number 19 to the extent that it indicates that I.R.S. has ever conducted and has not abandoned an inquiry into the civil tax liability of Bumpus and Huff.

Respondent - intervenors object generally and deny Findings numbered 20 through 23, as indicated above. In particular, as to Finding Number 23, there is uncontroverted evidence in the record that Agent Kinney was in contact with an agent of the Alaska Attorney General's office with regard to the American Tax Education Society, and evidence erroneously

excluded by the Court would have shown a purpose to obtain the membership list of the American Tax Education Society.

CONCLUSIONS OF LAW

Respondent - Intervenors object to Conclusion Number 2. Petitioners brought forth no evidence to show any legitimate purpose for the use of the summonses sought to be enforced herein, as required by *United States v. Genser*,595 F2d 146 (3rd Circuit 1979). Irrespective of the underlying purpose of the I.R.S. investigation of Bumpus and Huff, *Genser, supra* at 150, requires that there be a showing of legitimate civil purpose for each individual summons issued before it can be enforced. Here, the summonses speak for themselves; they address the criminal tax liability of Bumpus and Huff and nothing more. The summonses are the only evidence offered by petitioners, and they can lead only to the legal conclusion that there was no civil purpose for their use.

As for the purpose of the underlying investigation of Bumpus and Huff, petitioners rely solely on the uncorroborated statement of Special Agent John E. Hunt that the I.R.S. is pursuing any civil goals along with their criminal investigation. Such a statement might be legally sufficient to make a prima facie case were it not for the contradictions and significant ommissions in petitioners own evidence.

Agent Hunt testified to his own involvement in Project Tax Shelter and to the fact that his investigation of Mr. Bumpus originated in that involvement. He acknowledged that in his only contact with both Bumpus and Huff he informed them of his criminal investigation and gave them *Miranda* warnings, but did not inform either of them of any civil investigation. Petitioners put numerous tax returns into evidence, but these show no more than the fact that Bumpus and Huff, like millions of others, have duly filed their returns. Petitioners offered not a single document which gave any indication of any institutional activity in pursuit of civil goals. Clearly, this is not an ordinary case in which irregularities during the course of an audit led to the initiation of a criminal investigation. In such a case perhaps, a conclusory allegation that the civil audit had not been abandoned might meet the government burden of proof. In this case there is no such background, and against the govenment's own contradicting evidence, John Hunt's conclusory statement does

not make a legally sufficient case.

Respondents - intervenors object to Conclusions numbered 3 and 4. As noted above, respondent - intervenors introduced substantial proof, and offered more, that I.R.S. had no legitimate purpose in issuing the summonses herein and that the summonses were issued in bad faith. They have done much more than make conclusory allegations of bad faith or improper purpose, and they have done so in the context of a reasonable request for discovery through which they could substantiate and complete their case.

The Supreme Court has acknowledged in *United States v. LaSalle National Bank*, 434 U.S. 996 (1978), that taxpayers have a formidable burden of proof in resisting enforcement of §7602 summons. It is unthinkable that the Court could pose such a burden if it is impossible to meet. Respondents have put on proof that they were never informed of an audit, that they inquired as to a civil purpose by the I.R.S. and no information was forthcoming, and their contacts with I.R.S. indicate that they are subjects of a criminal investigation and nothing more. Respondent's Power of Attorney forms submitted to and accepted by I.R.S. show that no other purpose could have been contemplated.

It has been noted in cases and learned discourse that whatever the stated policy of I.R.S. as to the conduct of joint investigations, in practice I.R.S. does not continue a civil audit during the pendency of a criminal investigation. The I.R.S. even acknowledges this in their Manual Section 5141.21 (2), incorporated herein and attached as Exhibit A. In this case no civil audit preceded the criminal investigation and there was nothing to suspend. There simply was not and is not any civil purpose underlying the use of the summonses involved herein.

There is a possibility of civil consequences in every tax case. The *LaSalle* Court obviously was not referring to this possibility when they wrote of a civil purpose "in an institutional sense", or the issue in *LaSalle* and every other summons case on legitimate purpose would have been moot. If I.R.S. had a civil purpose in an institutional sense, it must be evidenced in an institutional sense as well. If the intent of the agent is not dispositive on behalf of a taxpayers case, *United States v. LaSalle National Bank, supra* at 315, then neither is it dispositive

on behalf of the government, and the government has failed to bring evidence to meet their burden of proof.

In addition, respondent - intervenors have put on uncontroverted evidence of bad faith in that I.R.S., through its agent John Hunt, failed to request the information sought directly from Bumpus or Huff, as required by the Privacy Act, Title 5, U.S.C. Section 552a (e) (2) and Internal Revenue Manual Section 5893.3 (1) (a), incorporated herein and attached as Exhibit A (See also I.R. Manual §5893.3 (2), and failed to inform them of a civil purpose for the investigation, if there was one, upon their inquiries.

Taxpayers can only respond to a summons on the basis of information available to them. These taxpayers, in addition to defending their own constitutional rights, have the responsibility to protect the privacy and First-Amendment rights of the other members of the American Tax Education Society. Evidence erroneously excluded by the court shows that I.R.S. is anxious to invade those rights and willing to use §7602 summonses to accomplish this. Taxpayers showed good faith and willingness to cooperate with a legitimate audit. I.R.S. showed bad faith and lack of candor, involving taxpayers in costly and time consuming summonses to accomplish an audit. I.R.S. bad faith in other respects is equally manifest, as noted *supra*.

In this connection, respondent - intervenors object Conclusions numbered 9 and 11, as well. Respondent - intervenors' proof of bad faith and no legitimate purpose was not fully laborated, nor could it be, considering that I.R.S. has exclusive possession of all the necessary proof, but they requested additional time and permission for discovery in order to complete their proof. They have gone far to show that such proof exists and will be revealed by the requested discovery. The formidable task demanded of taxpayers by the *LaSalle National Bank* Court requires in all justice, that this discovery be allowed. The cases cited by the Court in Conclusions numbered 9 and 11, as to the standards for discovery, are not dispositive in that they assume and refer to an ordinary case in which the criminal investigation grew out of a civil audit. This is not an ordinary case, and the discovery outlined in those cases is meaningless for respondent - intervenors' purposes.

Respondent - intervenors object to Conclusion Number 6 wherein it is stated:

> It is not a prerequisite to summons enforcement herein that the I.R.S. conduct a joint investigation as to the tax liabilities of individual respondents *and* their spouses. [Emphasis in original]

The Court cites no authority for this proposition, and it impliedly misstates respondent's argument. Taxpayers argue that, inasmuch as each of them filed joint income tax returns together with their wives for each of the tax years in question, they have no civil tax liability as individuals, and hence that summonses addressed to their tax liability as individuals could only refer to criminal tax liability. They offered to prove what is undeniably I.R.S. practice and procedure, i.e. to address a summons involving civil tax liability of married, jointly-filing taxpayers to the joint tax liability of both husband and wife. In addition they cited the case of *United States v. First National Bank in Dallas*, 468 F. Supp. 415 (N.D. Tex. 1979), where, in discussing an audit of taxpayers' records the Court said of the auditor, "He had to look at Ms. Yeoham's because Dr. and Ms. Yeoham had filed a joint return." That court recognized by that statement what is certainly not a novel proposition in law, that the cognizable property interest of one joint-filing spouse is necessarily affected by any determination involving the other, so that any legal process involving that interest must necessarily give notice to and recognize the interest of both, or be constitutionally defective and void. Assuming, therefore, that the summonses herein are not defective and void, they are addressed only to Bumpus' and Huff's individual criminal tax liability.

Respondent - intervenors object to Conclusion Number 7 in that they have put on proof by affidavit and testimony that Mr. Bumpus is not in possession and control of many of the documents sought by the summonses, and this proof was not contraverted in any way . Obviously, neither Glenn A. Huff or Charles H. Bumpus is in possession and control of any records sought from the bank.

Respondent - intervenors object to Conclusion Number 8. They assert that the proper standard of relevance can be found in the more recent case of *United States v. Coopers & Lybrand*, 550 F. 2d 615,619 (1977), where the Court stated:

> [E]xtending I.R.S. contentions herein to their logical conclusion, it is hard to determine what corporate records would not fall under a §7602 summons if the standard endorsed the production of *any* records which *might* show tax fraud or tax liability. I.R.S. does not, as it appears to assume on this appeal, have *carte blanche* discovery.[Emphasis in original.]

Particularly where, as here, the records sought are those of third parties, I.R.S. must do more than they have done here to show the relevance of what they seek. See also *United States v. Luther,* 481 F.2d 429 (9th Circuit 1973). Petitioners have supplied only vague suppositions as to how they think most of the documents sought might relate to their investigation. That is not legally sufficient to overcome the property and privacy right of those involved.

Respondent - intervenors object to Conclusion Number 10. Special Agent Hunt testified that in drawing up the summonses he demanded every document of every kind he could imagine. Many of the documents demanded did not even exist, and respondents were then burdened with the additional task of trying to ascertain where Mr. Hunt's imagination hit a mark.

A brief review of Internal Revenue Manual Section 5894.4, incorporated herein and attached as Exhibit A, shows that the summonses as drawn are in flagrant violation of I.R.S. procedures and the mandate of the law. See in particular section 5894.4 (1), where the Manual instructs, in regard description of documents requested:

The following are examples which are not considered legally adequate:

> (a) Bank books, bank statements, cancelled checks, and check stubs.
>
> (b) All books and records pertaining to the operation of the business of the witness.

Part (b) describes exactly Mr. Hunt's testimony as to what he sought to obtain through these summonses, and they are unenforceable for that reason alone. In addition, Mr. Hunt ignored the mandate of Internal Revenue Manual section 5893.12, incorporated herein and attached as Exhibit A, imposing additional restrictions on scope when records concerning the finances of a political organization, such as

American Tax Education Society, are sought. Great care for the protection of privacy and First Amendment rights of the members and the organization must be observed in such a case. Clearly this was not done.

RECOMMENDATIONS TO THE DISTRICT COURT

Respondent - intervenors make no objection to the Court's Recommendations to the District Court, since apparently none were filed.

CONCLUSION AND PETITION FOR REHEARING

Respondent - intervenors' objections to the findings and conclusions of the Magistrate are extensive and pervasive, and reflect a general conviction that the proceedings from which they arose were insufficient for a just adjudication of the case.

The proceedings were originally scheduled as a hearing upon Respondent - intervenors' motion for reassignment , but the docket sheet was changed at the last moment, and without notice to Respondents, to call for a hearing of the entire case.

Respondent - intervenors thus were disadvantaged throughout, because they were unable to call their chief witness, Charles H. Bumpus, whose testimony would have provided the focus and interconnection of Respondent's evidence.

Mr. Bumpus was unable to testify because, in planning his schedule to accommodate what was to have been the course of the summons enforcement proceedings, he arranged a necessary trip away from Alaska, and was unable to alter his plans when events transpired as they did.

Mr. Bumpus would have testified as to the nature and conduct of the American Tax Education Society and his connection with it. He would have explained how this involvement is at the core of the I.R.S. investigation of himself and Mr. Huff, and how the investigation of Respondents stems from and is inextricably connected with a larger investigation with institutional goals which are inconsistent with the usual goals of an I.R.S. investigation, namely determination of individual tax liability.

Mr. Bumpus would have testified to his own experiences, which effectively interconnect with evidence, offered by respondents, but erroneously excluded for lack of relevance, which would have gone to prove bad faith on the part of I.R.S. in the use of summonses herein.

Most importantly, Mr. Bumpus would have been able to respond to the calumnious accusations and intimations of fraud and perjury which were most unfairly injected in the records by petitioners' counsel, who had utterly no substantiation for such claims. Mr. Bumpus' testimony is essential to a just determination of this case.

Moreover, the many omissions and misstatements of Respondent - intervenors' evidence and arguments, contained in the Findings of Fact and Conclusions of Law, as noted in the Objections, *supra*, indicate a need for a full rehearing of most of the issues in the case, as provided by statute, Title 28 U.S.C. §636 (b)(1), and case law, *Webb v. Califano*, 468 F. Supp. 825 (E.D. Cal. 1979).

Therefore, Respondent - intervenors hereby petition the Court for a full rehearing on all matters objected to, and for an opportunity to add Mr. Bumpus' testimony to the record, in the interest of justice and fairness to all parties.

Dated this 27th day of December, 1979, at Wasilla, Alaska.

Filed: January 2, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,
Petitioners

v.

No. A79-311 Civil

ALASKA NATIONAL BANK OF
THE NORTH and RONALD G.
ROBERTSON, Assistant Vice
President,
Respondents.

ORDER

Whereas, the Court having heard respondent and having been fully advised in the premises, and

Whereas, no cause was shown as to why respondent should not be compelled to testify and produce the records demanded in Internal Revenue Service summons served upon him on September 4, 1979, by the Petitioner, John E. Hunt.

Therefore, IT IS ORDERED that within five days of the signing of this Order respondent shall produce the records demanded in the Internal Revenue summons served upon him September 4, 1979 to John E. Hunt, Special Agent, Internal Revenue Service.

IT IS SO ORDERED this 3rd day of January, 1980, at Anchorage, Alaska.

James S. Von der Heydt
UNITED STATE DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners,

v. No. A79-310 Civil

ALASKA NATIONAL BANK OF
THE NORTH and RONALD G.
ROBERTSON, Assistant Vice
President,

Respondents.

ORDER

Whereas, the Court having heard respondent and having been fully advised in the premises, and

Whereas, no cause was shown as to why respondent should not be compelled to testify and produce the records demanded in Internal Revenue Service summons served upon him on September 4, 1979, by the Petitioner, John E. Hunt,

Therefore, IT IS ORDERED that within five days of the signing of this Order respondent shall produce the records demanded in the Internal Revenue summons served upon him September 4, 1979 to John E. Hunt, Special Agent, Internal Revenue Service.

IT IS SO ORDERED this 3rd day of January, 1980, at Anchorage, Alaska.

James M. Fitzgerald
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, and JOHN E. HUNT, Special Agent of the Internal Revenue Service,

Petitioners,

v.

CHARLES H. BUMPUS, BELAIR ESTATES, a partnership; BIG LAKE HEIGHTS, a partnership; IRISH HILLS, a partnership; KNOLLWOOD HEIGHTS, a partnership; MINN-ARCTIC DEVELOPMENT, a partnership; NORTHERN LIGHTS ESTATES, a partnership; SKYLINE ESTATES, a partnership; WASILLA DEVELOPMENT, a partnership; WASILLA ESTATES, a partnership; WOODY LAKE ESTATES, a partnership; AMERICAN TAX EDUCATION SOCIETY; CB ENTERPRISES; CONTINENTAL TRUST ASSOC-
IA
IATION; MINN-ARCTIC d/b/a MADCO; and WORLD WIDE MARKETING & TAX CONSUL-TANTS,

Respondents.

ORDER TO ENFORCE INTERNAL REVENUE SERVICE SUMMONSES

The above-entitled case having come on for hearing before the United States Magistrate, John D. Roberts, on November 30, 1979 and December 3, 1979, on the order to show cause entered by this Court on November 2, 1979, with each of the parties thereto being represented by their respective counsel, this Court having considered the pleadings, Findings of Fact, Conclusions of Law, and the recommendations to this Court from the Magistrate and all other matters in the record and being otherwise fully advised in the premises thereof,

HEREBY ORDERS that the respondents, Charles H. Bumpus, Belair Estates, Big Lake Heights, Irish Hills, Knollwood Heights, Minn-Arctic Development, Northern Lights Estates, Skyline Estates, Wasilla Development, Wasilla Estates, Woody Lake Estates, American Tax Education Society, CB Enterprises, Continental Trust Association, Minn-Arctic d/b/a MADCO, and World Wide Marketing & Tax Consultants, shall appear before Special Agent John Hunt, at 310 K Street, Room 207, Anchorage, Alaska, on January 31, 1980, at 10:00 a.m., and produce for examination and/or photostatic copying or other mechanical means of reproduction, the following books, records and papers for each of the years 1975 through 1978:

A. All records of Belair Estates, Big Lake Heights, Irish Hills, Knollwood Heights, Minn-Arctic Development, Northern Lights Estates, Skyline Estates, Wasilla Development, Wasilla Estates, Woody Lake Estates, including, but not limited to:

1. Partnership agreements;
2. General ledger and subsidiary ledgers;
3. Journals:
   - A. General
   - B. Cash receipt and disbursements
   - C. Sales
4. Profit and loss statements;
5. Balance Sheet Statements;
6. Real estate contracts;
7. Deeds of trust;
8. Warranty deeds;

9. Bank statements, canceled checks and duplicate deposit slips;
10. Savings passbook;
11. Notes receivable from partners;
12. Contract collection escrows;
13. Form 1065 - U.S. Partnership Return of Income and related Schedule "K" and K-1 for years 1975 through 1978; and
14. Trust declarations for unincorporated business organizations, Foreign Trust Organizations, Pure Trust Organizations and other similar entities.

B. All records of American Tax Education Society, CB Enterprises, Continental Trust Association, Minn-Arctic d/b/a MADCO, and World Wide Marketing & Tax Consultants, including, but not limited to:

1. Contracts and/or declaration of trusts or other formal documents pertaining to the creation and operation of the above identified entities;
2. Federal tax returns and related forms for all tax periods ending after January 1, 1976. These returns and forms include but are not limited to:
   (a) Form 1041 - U.S. Fiduciary income tax returns;
   (b) Form 1040 NR - Non-resident alien individual income tax returns;
   (c) Form 1001 - Ownership exemption or reduced rate certificate;
   (d) Form SS-4 - Application for employer identification number.
3. Records disclosing identity of beneficiaries or holders of BIC's, also known as Certificates of Beneficial Interest;
4. Books and records of trust or trust organizations including but not limited to:
   (a) General ledger;
   (b) Cash receipts and disbursement journals;
   (c) Subsidiary ledgers;
   (d) Bank statements, canceled checks and duplicate deposit slips;
   (e) Minutes and correspondence;

(f) Notes payable and receivable;
(g) Financial statements, including profit and loss statements and balance sheets;
(h) Records of contributions, gifts, loans, forgiveness of debt, joint ventures, partnership or other business and financial transactions;
(i) All bills of sale, invoices, promissory notes, all contracts and agreements including assignment of interest, leasing agreements and management service agreements; and
(j) Records which relate to the creation or operation of other entities, trusts or trust organizations.

The examination shall continue from day to day until completed.

IT IS FURTHER ORDERED that the affadavit and exhibits filed therewith by the respondent Charles H. Bumpus on December 10, 1979, for an *in camera* inspection by the Court be made available to the United States of America by the Clerk for inspection and copying.

IT IS FURTHER ORDERED that the respondent, Charles H. Bumpus, appear before Special Agent John E. Hunt at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the tax liabilities of the respondent, Charles H. Bumpus, as to each or any of the years 1976 through 1978.

In the event Special Agent John E. Hunt and the respondent, Charles H. Bumpus, cannot agree mutually upon a time and place, then the respondent, Charles H. Bumpus, is ordered to appear at the offices of Special Agent John E. Hunt, located at 310 K Street, Room 207, Anchorage, Alaska, at a time designated by Special Agent John E. Hunt; notice of said time and place will be given to the respondent, Charles H. Bumpus, by Special Agent John E. Hunt, by means of a certified letter mailed to the respondent, Charles H. Bumpus, at his last known business address at least ten (10) days prior to the date set by Special Agent John E. Hunt.

IT IS FURTHER ORDERED that the testimony of Charles H. Bumpus may be recorded by stenographic means at the option of the United States by a person authorized by Federal

law or Alaska law to record depositions or court proceedings. If the United States, at its own expense, provides such a court reporter, then such reporter shall make available to the respondent a copy of the transcript of the proceedings at his or her usual, normal, and customary rates for such copies.

IT IS FURTHER ORDERED that if the United States elects to provide a court reporter no other recording of the proceeding may be made.

DATED: January 11, 1980.

James S. Von der Heydt
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners-Appellees,

v.

ALASKA NATIONAL BANK OF THE NORTH and RONALD G. ROBERTSON, Assistant Vice President,

Respondents,

and

GLENN A. HUFF,
Intervenor-Appellant.

No. 80-3017
D.C. # A79-310 JMF
ALASKA
(ANCHORAGE)

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners-Appellees,

v.

ALASKA NATIONAL BANK OF THE NORTH and RONALD G. ROBERTSON, Assistant Vice President,

Respondents,

and

D.C. # A79-311 JI

CHARLES H. BUMPUS,
Intervenor-Appellant.

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners-Appellees,

v.

CHARLES H. BUMPUS, BELAIR
ESTATES, a partnership; BIG
LAKE HEIGHTS, a partnership;
IRISH HILLS, a partnership;
MINN—ARCTIC DEVELOP-
MENT, a partnership, et al.,

Respondents-Appellants.

No. 80-3026
D.C. # A79-348 JV
ALASKA
(ANCHORAGE)

MEMORANDUM

Appeal from the United States District Court
for the District of Alaska

Submitted 7/9/80

Before: MERRILL and KENNEDY, Circuit Judges, and SMITH,* District Judge.

These consolidated appeals are from orders of the District Court for the District of Alaska enforcing summonses issued by the Internal Revenue Service. The Government argues that Appeal No. 80-3017 is moot to the extent the bank has produced the bank records of entities other than the American Tax Education Society (ATES), and that the appeal should be dismissed. The Government also contends that to the extent the appeal relates to the order requiring the production of the ATES records, the action is not presently before this court because the district court is still considering that order on remand.

We agree with the Government's contention that the appeal is moot to the extent the records in this case have been produced. *Cf. SEC v. Laird*, 598 F. 2d 1162, 1163 (9th Cir. 1979) (appeal from order enforcing SEC summons mooted by compliance). It does not appear, however, that the entire case is moot. Because the Government has not yet received all the documents covered by the summonses, the appeal is not moot with respect to the district court's order. This court granted only a limited remand until March 7, 1980 to allow the district court to consider ATES's motion to intervene and for a protective order. The limited remand vested the district court with jurisdiction to issue the modified enforcement order and when the time of the remand expired, the court was again vested with the jurisdiction of the appeal.

The principal argument on appeal is that the enforcement orders were issued without review of the records of the proceedings before the magistrate and without response to the objections to the magistrate's report. Although, contrary to

* Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

appellant's argument, the district court need not hear additional testimony, it must make a *de novo* determination of those portions of the magistrate's proceedings to which specific objection is made, prior to enforcing the summons. 28 U.S.C. § 636(b)(1); *United States v. Raddatz*, ____ U.S. ____, 48 U.S.L.W. 4813, 4815 (U.S. June 23, 1980) (No. 79-8); *Orand v. United States*, 602 F .2d 207 (9th Cir. 1979). We are satisfied, however, that in the unique procedural circumstances of these cases, it would be an idle act now to reverse the district court's orders.

Appellants have never alleged specific facts that would tend to support their burden of showing that the summonses were issued in bad faith under the *LaSalle* standards. *United States v. LaSalle National Bank*, 437 U.S. 298 (1977).

Appellants concede that they did not request preparation of a transcript or present the trial court with a tape recording of the magistrate's proceedings before the trial court ruled on the objections. Appellants also admit and the record reveals that in the subsequent enforcement proceedings, the district court reviewed and considered the entire record before the magistrate. Therefore, in these circumstances, we affirm the district court's orders.

AFFIRMED.

Filed: August 7, 1980.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners-Appellees,

v.

ALASKA NATIONAL BANK OF
THE NORTH and RONALD G.
ROBERTSON, Assistant Vice
President,

Respondents,

and

GLENN A. HUFF,
Intervenor-Appellant.

No. 80-3017
D.C. # A79-310 JMF
ALASKA
(ANCHORAGE)

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners-Appellees,

v.

ALASKA NATIONAL BANK OF
THE NORTH and RONALD G.
ROBERTSON, Assistant Vice
President,

Respondents,

and

D.C. # A79-311 JMF

CHARLES H. BUMPUS,
Intervenor-Appellant.

UNITED STATES OF AMERICA
and JOHN E. HUNT, Special Agent
of the Internal Revenue Service,

Petitioners-Appellees,

v.

CHARLES H. BUMPUS, BELAIR ESTATES, a partnership; BIG LAKE HEIGHTS, a partnership; IRISH HILLS, a partnership; MINN—ARCTIC DEVELOPMENT, a partnership, et al.,

Respondents-Appellants.

No. 80-3026
D.C. # A79-348 JV
ALASKA
(ANCHORAGE)

ORDER

Appeal from the United States District Court
for the District of Alaska

BEFORE: MERRILL and KENNEDY, Circuit Judges, and SMITH*, District Judge.

Upon due consideration, the petition for rehearing is denied.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The suggestion for a rehearing en banc is rejected.

Filed: October 15, 1980.

* Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

No. 80-1189

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES H. BUMPUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1189

CHARLES H. BUMPUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below enforcing internal revenue summonses on the ground that the district court failed to make de novo findings of fact after the case was heard by a magistrate.

In these consolidated internal revenue summons enforcement cases, the district court initially referred the government's petitions for enforcement of the summonses to a United States magistrate in the United States District Court for the District of Alaska. Petitioners contended, *inter alia*, that the agent's investigations were solely criminal and, accordingly, the summonses were improper. After a hearing held by the magistrate at which the issuing agent testified, the magistrate made recommended findings of fact that the summonses were issued for the purposes of securing "information relevant to the * * * inquiry into the civil

tax liability of" petitioner Bumpus (Pet. App. x); that the investigating agent had made no recommendation for prosecution to his supervisor, nor had a recommendation of prosecution been sent by the Internal Revenue Service to the Department of Justice (*ibid.*); and that the Internal Revenue Service had "not abandoned its inquiry into the civil tax liability of" petitioner Bumpus (Pet. App. xii). Petitioners objected to the findings that the agent had a civil purpose (Pet. App. xviii) and that the Internal Revenue Service had not abandoned an inquiry into the tax liability of petitioner Bumpus (Pet. App. xx). They did not dispute the finding that there had been no recommendations for prosecution. While petitioners stated these objections to the district court, they failed to order a transcript or present a tape recording of the proceedings before the magistrate for review by the district court (Pet. App. xxxviii). After considering the record before it and the magistrate's report, the district court ordered the summons enforced (Pet. App. xxviii-xxxiv).

The court of appeals affirmed (Pet. App. xxxv-xxxviii). It rejected petitioners' argument that the district court failed to make a de novo determination of the magistrate's findings, as required by 28 U.S.C. 636(b). As the court noted, petitioners failed to allege "specific facts that would tend to support their burden of showing that the summonses were issued in bad faith" (Pet. App. xxxviii). The court further observed that petitioners conceded that they failed to order a transcript or present a tape recording of the magistrate's proceedings and that in a subsequent enforcement proceeding the district court had reviewed the entire record of the proceedings before the magistrate. "[I]n the[se] unique procedural circumstances * * * , [the court of appeals concluded that] it would be an idle act now to reverse the district court's orders" (*ibid.*).

1. The decision below correctly enforced the summonses at issue. It is well established that the burden of establishing the abandonment of a civil purpose, as a defense to the enforcement of a summons, rests on the person resisting enforcement. See *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978). The person resisting enforcement, therefore, is required to at least allege specific facts, which, if proved, would establish that enforcement of the summons would be improper. See *United States* v. *Garden State National Bank*, 607 F. 2d 61, 69-70 (3d Cir. 1979). But here, as the court of appeals noted (Pet. App. xxxviii), petitioners failed to allege any such facts, and they do not appear to contend otherwise.[1] Thus, whether or not the district court erred in not making a de novo determination of the magistrate's recommended findings, petitioners still could not defeat the enforcement of these summonses. Accordingly, the court of appeals correctly held that any possible irregularity in the district court's review of the magistrate's recommendations would not be grounds for reversal of the order enforcing the summonses.

2. At all events, it is not clear that the district court failed to satisfy the de novo review requirements of Section 636(b). While contesting the magistrate's recommended findings, petitioners failed to supply the district court with a transcript or recording of the proceedings before the magistrate. Both the district court and the court of appeals, therefore, could properly assume that petitioners were not contesting the facts developed at the hearing, but rather the legal conclusions of the magistrate based on these facts. In these circumstances, the district court could hardly be

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[1] Petitioners contend that "[t]hey alleged that there was no civil purpose for the tax investigation" (Pet. 6). Such a conclusory allegation is easily made but falls short of the requirement that they allege specific facts demonstrating the lack of a civil purpose. *United States* v. *Church of Scientology of California*, 520 F. 2d 818, 824 (9th Cir. 1975).

faulted for failing to review a transcript that was not put before it. See *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 15. Compare *United States* v. *Miller*, 609 F. 2d 336, 340 (8th Cir. 1979); *United States* v. *Southern Tanks, Inc.*, 619 F. 2d 54, 56 (10th Cir. 1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981